

Internal Revenue Service

memorandum

CC:TL:Br3
GEBowden

date: FEB 13 1989

to: Assistant District Counsel, Newark MA:NEW

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3

subject: [REDACTED]

You have requested technical advice as to the above-named taxpayer.

ISSUE

Whether the retroactive amendments made to the Gas Guzzler Excise Tax, I.R.C. § 4064, by the Tax Reform Act of 1986 permit the reopening of tax years [REDACTED] through [REDACTED] to tax vehicles now subject to the tax.

FACTS

Taxpayer timely filed returns for the Gas Guzzler Tax for periods from [REDACTED] through [REDACTED]. In [REDACTED], taxpayer filed a claim for refund for \$ [REDACTED], for these periods, because it discovered that [REDACTED] of its [REDACTED] models were not actually subject to the tax. These [REDACTED] models all had gross vehicle weight in excess of [REDACTED] pounds which rendered them exempt from the tax under I.R.C. § 4064(b)(1)(A). The claims were examined and a refund of \$ [REDACTED] was paid to the taxpayer in [REDACTED].

The Tax Reform Act of 1986 modified § 4064(b)(1)(A) to provide that only those vehicles which exceeded 6000 pounds in unloaded gross vehicle weight would be exempt from tax. None of taxpayer's models exceeded [REDACTED] pounds unloaded gross vehicle weight. Further the Tax Reform Act of 1986 provided that this change should take effect "as if included in the amendments made by Section 201 of Public Law 95-618...", i.e., retroactive to 1978. Thus, all of taxpayer's models were taxable during the period at issue, and no refund should have been made. Your memorandum requests advice as to what measures might be taken to collect the tax.

ANALYSIS

The normal three year statute of limitations has run for all periods at issue. Your memorandum suggests three possible remedies. The most conceptually suitable mechanism would be a

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suit for erroneous refund, as provided by I.R.C. § 6532(b). As your memorandum points out, the statute requires that such a suit be filed within two years of the date the refund was made. In this case that would have been [REDACTED], so no erroneous refund suit is available.

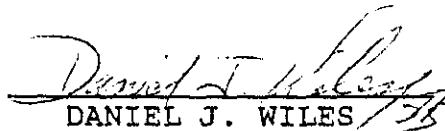
The second possibility you suggest is an extension of the statute by virtue of I.R.C. § 6501(e)(3) which allows the statute to be extended to six years when 25% of the tax due is omitted. That requirement would be met here, except that the statute provides that no tax shall be taken into account if the underlying transaction is fully disclosed. Here, the taxpayer fully disclosed the existence and nature of the [REDACTED] involved in his original returns and in his claim for refund. So this provision is inapplicable.

Finally, you suggest that under I.R.C. § 6501(c)(3), tax may be assessed at any time if there is a failure to file a return. Here, taxpayer clearly filed a return. We do not believe that there is any way in which the modification of the statute can be construed to require filing an amended return. Even if the statute had explicitly required an amended return, no relief from the statute of limitations would be available in this case, under the rationale of Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934).

In the ordinary course of events, we would have no problem. If taxpayer's [REDACTED] were ineligible before the modification, no return would have been filed. Even in the instant situation, we would have been able to collect the tax due, if we had properly diagnosed the problem prior to [REDACTED].

CONCLUSION

We concur with most of the analysis in your memorandum. No remedy is now available, although an erroneous refund action would be appropriate, if not now time barred.


DANIEL J. WILES